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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ROY HECK,

Petitioner,

v.

JAMES HUMPHREY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS

PAMELA CARTER
ATTORNEY GENERAL OF INDIANA

MATTHEW R. GUTWEIN*
AREND J. ABEL
DANA CHILDRESS-JONES
DEPUTY ATTORNEYS GENERAL

219 State House
Indianapolis, Indiana 46204
(317) 232-6255

Counsel for Respondents

* Counsel of Record

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QUESTIONS PRESENTED

1. Whether a state prisoner attacking the legality of his conviction may circumvent the exhaustion requirement of 28 U.S.C. § 2254(b) by filing an action under 42 U.S.C. § 1983 and confining his prayer for relief to a declaratory judgment and money damages.

2. Whether a state prisoner's action attacking the legality of his conviction that includes unexhausted claims should be dismissed without prejudice, rather than stayed, pending exhaustion of state remedies.

TABLE OF CONTENTS

QUESTIONS PRESENTED ..... *i*

STATEMENT 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 8

I. A STATE PRISONER MAY NOT ATTACK THE LEGALITY OF HIS CONVICTION IN AN ACTION UNDER SECTION 1983 WITHOUT EXHAUSTING STATE REMEDIES 8

A. A State Prisoner's Challenge to the Lawfulness of His Conviction and Confinement Requires Exhaustion of State Remedies 9

1. The Comity Considerations Underlying Section 2254 Require Exhaustion Whenever a State Prisoner Is Attacking the Legality of His Confinement 11

2. The Comity Interests Underlying Section 2254 Are Particularly Strong Where, as Here, A Prisoner Is Attacking a Valid State Court Judgment of Conviction 18

B. Limiting the Requested Relief to Damages Provides No Ground for Avoiding Exhaustion 21

1. A Request for Damages Based on an Allegedly Illegal Confinement Implicates the Same Comity Concerns As a Request for Habeas Corpus Itself 22

2. Neither *Wolff v. McDonnell* Nor *Preiser*'s Dictum on the Availability of Damages Control Petitioner's Claim 26

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE APPROPRIATE REMEDY IS DISMISSAL WITHOUT PREJUDICE 28

A. This Court Has Consistently Held that Unexhausted Habeas Claims Should be Dismissed, Not Stayed 29

B. Practical Considerations Counsel Against the Rule Suggested by Petitioner 31

1. The Vast Majority of Claims Such As Petitioner's Will Ultimately Be Found Without Merit 31

2. Existing Case Law Adequately Protects Those Few Claims That Are Meritorious 35

CONCLUSION 38

TABLE OF AUTHORITIES

Cases: **Page**

Albright v. Oliver, 114 S. Ct. 807 (1994) 34
Alderman v. United States, 394 U.S. 165 (1969) 4
Allen v. McCurry, 449 U.S. 90 (1980) 10, 32
Barefoot v. Estelle, 463 U.S. 880 (1983) 18
Board of Regents v. Tomanio, 446 U.S. 478 (1980) 37
Brecht v. Abrahamson, 113 S. Ct. 1710 (1993) 12, 25
Briscoe v. LaHue, 460 U.S. 325 (1983) 33
Buckley v. Fitzsimmons, 113 S. Ct. 2606 (1993) 33
Butler v. McKellar, 494 U.S. 407 (1990) 18
Caldwell v. Line, 679 F.2d 494 (5th Cir. 1982) 28
City of Fort Wayne v. Hamilton, 132 Ind. 487, 32 N.E. 324 (1892) 36
Coleman v. Thompson, 111 S. Ct. 2546 (1991) 18
Commercial Credit Corp. v. Ensley, 148 Ind. App. 151, 264 N.E.2d 80 (1970) 36
Deakins v. Monaghan, 484 U.S. 193 (1988) 16, 30
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 19
Duckworth v. Serrano, 454 U.S. 1 (1981) 9, 29
Fair Assessment in Real Estate Association, Inc. v. McNary, 454 U.S. 100 (1981) ..... *passim*
Fay v. Noia, 372 U.S. 391 (1963) 13
Feeney v. Auger, 808 F.2d 1279 (8th Cir. 1986) 28
Franklin v. Webb, 653 F.2d 362 (8th Cir. 1981) 28
Fulford v. Klein, 529 F.2d 377 (5th Cir. 1976) 28
Gerstein v. Pugh, 420 U.S. 103 (1975) 27
Gomez v. United States District Court of the Northern District of California, 112 S. Ct. 1652 (1992) 21, 23
Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) 22
Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974) .. 25, 28

Hadley v. Werner, 753 F.2d 514 (6th Cir. 1985) 28
Hamlin v. Warren, 664 F.2d 29 (4th Cir. 1981), *cert. denied*, 455 U.S. 911 (1982) 28
Hardin v. Straub, 490 U.S. 536 (1989) 37
Haring v. Prosise, 462 U.S. 306 (1983) 27
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 27, 34
Ex parte Hawk, 321 U.S. 114 (1944) 12
Heck v. Richards, 113 S. Ct. 1308 (1993) 35
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) ..... *passim*
Imbler v. Pactman, 424 U.S. 409 (1976) 33
Juidice v. Vail, 430 U.S. 327 (1977) 10, 19
Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992) 14
Kraft v. Thomas, 123 Ind. 513, 24 N.E. 346 (1890) 36
Leonard v. Hammond, 804 F.2d 838 (4th Cir. 1986) 28
Mabry v. Gray, 518 F.2d 512 (7th Cir. 1975) 4
Martin v. Merola, 532 F.2d 191 (2d Cir. 1976) 28
McCleskey v. Zant, 499 U.S. 467 (1991) 12
Meadows v. Evans, 550 F.2d 345 (5th Cir.), *cert. denied*, 434 U.S. 969 (1977) 28
Memphis Community School District v. Stachura, 477 U.S. 299 (1986) 8
Monk v. Secretary of Navy, 793 F.2d 364 (D.C. Cir. 1986) 28
Montana v. United States, 440 U.S. 147 (1979) 6, 15
Parkhurst v. State of Wyoming, 641 F.2d 775 (10th Cir. 1981) 28
Patsy v. Board of Regents, 457 U.S. 496 (1982) ..10, 22, 25
Preiser v. Rodriguez, 411 U.S. 475 (1973) ..... *passim*
Richardson v. Fleming, 651 F.2d 366 (5th Cir. 1981) 28
Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 6, 19, 21
Rose v. Lundy, 455 U.S. 509 (1982) 12, 14, 25, 29
Ex parte Royall, 117 U.S. 241 (1886) 5, 12
Samuels v. Mackell, 401 U.S. 66 (1971) 19, 23
Scates v. State, 178 Ind. App. 624, 383 N.E.2d 491 (1978) 36

Scruggs v. Moellering, 870 F.2d 376 (7th Cir.), cert. denied, 493 U.S. 954 (1989) 28
Slayton v. Smith, 404 U.S. 53 (1971) 29
Souffront v. Compagnie des Sucreries de Porto Rico, 217 U.S. 475 (1910) 15
Spina v. Aaron, 821 F.2d 1126 (5th Cir. 1987) 28
State ex rel. Pink v. Cockley, 110 Ind. App. 417, 37 N.E.2d 284 (1941) 35
Steffel v. Thompson, 415 U.S. 452 (1974) 16, 19, 20
Teague v. Lane, 489 U.S. 288 (1989) 12
Tedford v. Hepting, 990 F.2d 745 (3d Cir.), *cert. denied*, 114 S. Ct. 317 (1993) 28
Tower v. Glover, 467 U.S. 914 (1984) 10
United States v. Padilla, 113 S. Ct. 1936 (1993) 4
Wainwright v. Sykes, 433 U.S. 72 (1977) 18
Will v. Michigan Department of State Police, 491 U.S. 58 (1989) 32
Williams v. Hepting, 844 F.2d 138 (3d Cir.), cert. denied, 488 U.S. 851 (1988) 28
Wolff v. McDonnell, 418 U.S. 539 (1974) 26
Young v. Kenny, 907 F.2d 874 (9th Cir. 1990) 37
Younger v. Harris, 401 U.S. 37 (1971) 6, 13, 19, 24

Statutes

42 U.S.C. § 1983 ..... *passim*
Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997e 21
Tax Anti-Injunction Act, 28 U.S.C. § 1344 11
28 U.S.C. § 1915(d) 3
28 U.S.C. § 2254 ..... *passim*

Miscellaneous

Annual Report of the Director of the Administrative Office of the United States Courts (1989) 32
54 C.J.S. *Limitation of Actions* (1987) 36

M. Schwartz, *The* Preiser *Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DePaul L. Rev. 85 (1988) 25
Restatement (Second) of Judgments (1982) 15
C. Wright, A. Miller & C. Cooper, *Federal Practice & Procedure* (1981 &1993 Supp.) 16, 17
51 Am. Jur. 2d *Limitation of Actions* (1970) 36

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BRIEF FOR RESPONDENTS

STATEMENT

Petitioner, a state prisoner, has attacked the legality of his conviction in a federal action purportedly brought under 42 U.S.C. § 1983, seeking monetary and declaratory relief. The district court dismissed the action without prejudice, finding that petitioner must exhaust state remedies. The court of appeals affirmed.

1. The facts surrounding this case are tragic. Petitioner had a long history of violently abusing his wife. App. 12-13;

19-20.[1] In response to his repeated violence against her, she separated from him, filed for a divorce, sought and obtained a civil restraining order, pressed criminal charges, and sought police protection. App. 4-9. Ultimately, the legal system was incapable of protecting her, and shortly before petitioner was scheduled for trial on criminal charges arising out of the abuse, he forced his way into her home and killed her. App. 29. He then unceremoniously buried her body in a sinkhole on his farm and asked others to dump refuse over the grave to hide his crime. J.A. 18. He told the victim's children and other family members that she had confided in him that she was leaving town for an unknown destination and would be gone for an unspecified period of time. *E.g.*, J.A. 17; App. 14. Understandably suspicious, they asked police to investigate. App. 26-27. When petitioner learned of the police investigation of his wife's disappearance, he asked his girlfriend and daughter to telephone the police and pretend to be his wife. J.A. 17-18. Some ten months later, in October of 1986, pursuant to a search warrant, the victim's body was discovered with the cord of a curling iron found wrapped around her neck. App. 31-32. Petitioner was immediately charged with her murder, and was convicted by a jury of voluntary manslaughter. J.A. 16.

The sufficiency of the evidence against petitioner is firmly established by both the opinion of the Indiana Supreme Court on direct appeal, J.A. 18-20, and by subsequent

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[1] Citations in the form "App. ___" are to the Appendix bound with this brief. The materials so included are from the record of petitioner's criminal trial, which were also part of the record before the Seventh Circuit when it passed upon the appeal from the denial of his petition for writ of habeas corpus. *See* J.A. 64. Because those materials consisted of original state court records, they were returned to the State of Indiana following disposition of that appeal, and are presently in the possession of the State. Respondents will, of course, make those original materials available should either petitioner or the Court wish to review them.

judgments of a federal district court and court of appeals on *habeas corpus* review, J.A. 54; 62.[2] Indeed, the court of appeals found the evidence so one-sided that it rejected his claim of error in the admission of a supposedly suggestive voice identification, finding the error, if any, "harmless beyond a reasonable doubt." *Id.*

2. While his direct criminal appeal was still pending, J.A. 16, he filed this action, claiming entitlement to damages for an allegedly "unlawful, unreasonable, and arbitrary investigation." J.A. 5. According to petitioner, defendants prevented him from "prov[ing] my innocence of this crime." *Id.* In his complaint below, he made three claims:

> Between May and July, 1987:
>
> 1. Defendants . . ., after conducting a search in 1986 of my deceased wife's trail[e]r home, took items from her relatives and used them in their unlawful, unreasonable, and arbitrary investigation of me because they. . . believed me to be responsible for her death.
> 2. They also arbitrarily, unlawfully, unreasonably and knowingly destroyed clothing from my deceased wife's body which was exculpatory in nature and could have proved my innocence of this crime.
> 3. These named defendants directed . . . an illegal and unlawful v[oi]ce identification procedure (3) times with a potential State witness, without my or my attorney's presence.

Id. In his brief in this Court, he claims he is entitled to "damages to compensate him for losses due to wrongful

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[2] With the exception of the voice identification claim, the claims petitioner raised on habeas do not overlap with those contained in his complaint. *See* J.A. 46-47.

confinement, punitive damages, declaratory relief, costs and attorneys fees." Pet. Br. at 4.

Despite the suggestion to the contrary in his brief to this Court, Pet. Br. at 4, petitioner did not claim an illegal search, or seek any damages in connection therewith. The last of the searches, the one in which his wife's body was finally found, took place in October, 1986, well before the April-July, 1987, time frame of the allegations of the complaint. App. 31. Nor is petitioner correct in claiming that the legality of this search has "not been considered by an Indiana court at any other time." Petitioner raised his claim of illegality in the State trial court, but that claim was denied. App. 1-2. The claim was not renewed on his direct appeal.[3]

3. Under 28 U.S.C. § 1915(d), the district court dismissed petitioner's claim as frivolous because he had not exhausted his State remedies and therefore could not challenge the legality of his conviction. J.A. 13-14.

The Seventh Circuit affirmed, concluding that petitioner's claim, which "challeng[ed] the legality of his conviction" was properly "classified as an application for habeas corpus and the plaintiff must exhaust his state remedies." J.A. 66. The more difficult question, according to the court of appeals, "is whether the suit should have been stayed rather than dismissed lest the plaintiff be prevented by the statute of limitations after he exhausts his state remedies." *Id.* Nonetheless, the court of appeals concluded that Indiana law would provide plaintiff adequate relief in such a situation, and if it did not, federal law would do so. J.A. 67-69. Accordingly, the court of appeals concluded the dismissal was

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[3] Moreover, petitioner would have no standing to object to the search of his *wife's* home following her disappearance. *See United States v. Padilla*, 113 S. Ct. 1936 (1993); *Alderman v. United States*, 394 U.S. 165, 171-74 (1969); *Mabry v. Gray*, 518 F.2d 512 (7th Cir. 1975) (Stevens, J.).

proper and therefore affirmed. J.A. 69. This Court granted certiorari. J.A. 82.

SUMMARY OF THE ARGUMENT

I. Petitioner's claim is an attack on the legality of his conviction and the propriety on his continued confinement. As such, a federal court should not consider the merits of his claim, much less grant relief, unless petitioner has exhausted state remedies. With regularity, this Court has found that the federal courts should postpone or decline plenary consideration of claims under 42 U.S.C. § 1983 in order to accommodate other federal policies. *See Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981). In fact, this Court has applied that general principle where, as here, a state prisoner seeks to avoid 28 U.S.C. § 2254(b)'s exhaustion requirement by filing an action under § 1983. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). Habeas corpus, this Court held, is the exclusive remedy when a state prisoner challenges the "fact or duration of his confinement." *Id.* at 489.

As *Preiser* recognized, the exhaustion requirement is rooted in considerations of comity found to be fundamental by this Court long before Congress codified it in 1948. *Ex parte Royall*, 117 U.S. 241, 251 (1886). *Preiser* refused to allow the comity interests served by exhaustion to be defeated "by the simple expedient of putting a different label on [the] pleading." 411 U.S. at 489-90. But that is precisely what petitioner attempts to do here.

As a predicate to an award of damages, a federal court necessarily would have to "determin[e] that he is entitled to immediate release * * * from confinement." *Preiser*, 411 U.S. at 500. That determination, regardless of whether the federal court actually grants release, would deprive the state courts of the opportunity to decide initially if petitioner's

constitutional claims were violated. As a practical matter, moreover, the federal determination could directly lead to a state prisoner's release, either because of its persuasive (and intrusive) effect on a state court or its precedential effect on a federal habeas court. And as a legal matter, the federal judgment may well have preclusive effect on the state in a subsequent action seeking release, if the state exercised adequate control over the initial federal action. *Montana v. United States*, 440 U.S. 147, 154 (1979). All of these results are inimical to the interests of comity served by the exhaustion rule.

Not only is petitioner attempting to use § 1983 to challenge the legality of his confinement—something *Preiser* does not permit—but he is also seeking to attack a valid Indiana conviction. Petitioner's claim, therefore, raises comity concerns above and beyond those present in *Preiser*, making exhaustion even more strongly warranted here. This Court has consistently held that a federal § 1983 action cannot be used to review collaterally the propriety of a state-court judgment, particularly a criminal one. *Younger v. Harris*, 401 U.S. 37 (1971); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). A federal determination that petitioner's conviction was unlawful and his confinement improper would conflict irreconcilably with his valid state judgment of conviction, and thereby create "unnecessary friction between the federal and state court systems." *Preiser*, 411 U.S. 490. Nor may the policies behind the requirement be avoided by the simple expedient of foregoing the available state remedies, as petitioner has done here. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975).

Petitioner's argument that the relief sought in a § 1983 complaint is the sole determinant of whether exhaustion is required is flatly inconsistent with this Court's precedent. In *Preiser* and *Fair Assessment*, this Court held that it is the substance of a § 1983 complaint, not its form, that determines whether and when a federal court will entertain its claims.

Indeed, that result is the only rational one, for the fact that petitioner has sought only damages does nothing to avoid the comity concerns of § 2254 that would be compromised if a federal court were to consider his claim. Nor does petitioner have an immediate need to obtain the relief he seeks. This Court and Congress both have determined that a state prisoner's interest in immediate federal adjudication is subordinate to the interests of comity when a prisoner is seeking release. Surely a prisoner's interest in money damages is not more weighty than the interest in the restoration of his liberty. An immediate federal forum is also not needed to adjudicate petitioner's underlying claims. Through the habeas statutes, Congress has concluded that where, as here, a state prisoner attacks the legality of his conviction, the state courts are the superior forum to adjudicate those claims initially.

II. The Seventh Circuit was also correct to dismiss, rather than stay, petitioner's action pending exhaustion of state remedies. This Court has repeatedly held that dismissal is required when a petition for habeas corpus relief contains unexhausted claims. For both legal and practical reasons, there is no sound basis to deviate from that rule here. Petitioner's suggestion that the Seventh Circuit's rule will result in the dismissal of meritorious claims cannot be squared with the collective experience of our courts. The various immunity doctrines cause the vast majority of claims such as petitioner's to be disposed of as frivolous either upon or soon after filing. For the minuscule number of cases that are left, existing case law, both state and federal, adequately protects claims that are meritorious from a statute of limitations bar—the only possible justification for petitioner's proposed stay rule. Thus, there is simply nothing to be gained by petitioner's approach, while on the other, his proposal would impose significant burdens on the federal courts by requiring the retention of thousands of frivolous lawsuits on their dockets.

ARGUMENT

I. A STATE PRISONER MAY NOT ATTACK THE LEGALITY OF HIS CONVICTION IN AN ACTION UNDER SECTION 1983 WITHOUT EXHAUSTING STATE REMEDIES.

At the outset, it is important to clarify the precise nature and context of petitioner's claim. Petitioner was convicted in an Indiana trial court; that conviction was affirmed by the Indiana Supreme Court and left undisturbed on federal habeas corpus review. J.A. 16-27, 61-63. In this federal action, petitioner now claims that he is innocent and thus ought not be in prison. J.A. 5. In addition to seeking declaratory relief, petitioner seeks money damages that are tied to the alleged wrongfulness of his confinement. Pet. Br. 4. Neither in his complaint nor at any other time throughout these proceedings has petitioner suggested that his claimed damages relate to anything other than his contention that his conviction was wrongful and his continued confinement improper.[4] The issue in this case, therefore, is a narrow one: may a state prisoner use a § 1983 action to attack the legality of a valid

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[4]The Seventh Circuit, for example, rested its decision on the fact that petitioner's request for damages flowed from his alleged wrongful conviction and confinement. J.A. 65-66. Yet in his petition for certiorari or in his brief on the merits, petitioner did not assert that the court below misunderstood petitioner's claim. His complaint similarly makes clear that the claimed damages are tied to his conviction and confinement, as the only tangible items of damages specified are petitioner's "losses incur[r]ed from his empl[o]yment and farm operations," presumably because he could not engage in them while imprisoned. *See* J.A. 7. While petitioner's counsel may now attempt to suggest he is claiming something else, *see* Pet. Rep. Br at 8 n.6 ("in fact, petitioner seeks *both* lost income and compensation for the violation of his constitutional rights") (emphasis in original), it is clear that "the abstract value of a constitutional right may not form the basis for § 1983 damages." *Memphis Community School District v. Stachura*, 477 U.S. 299, 308 (1986) (footnote omitted).

state-court conviction and thereby circumvent the exhaustion requirement mandated by Congress in 28 U.S.C. § 2254(b)?

Both the district court and the court of appeals properly rejected petitioner's claim. The exhaustion requirement first enunciated by this Court and later codified by Congress implements fundamental principles of comity necessary to our federal system of government. Congress's explicit mandate that state prisoners must exhaust their state remedies before attacking their convictions in federal court would be rendered wholly meaningless if a state prisoner could secure federal review of his conviction by the simple expedient of confining his prayer for relief to money damages. Not only would petitioner's approach deprive the state courts of the initial opportunity to decide petitioner's constitutional claims, but as a practical matter, and possibly as a legal matter, a damages award by a federal court could directly lead to petitioner's release—a result that would be "unseemly." *Duckworth v. Serrano*, 454 U.S. 1, 4 (1981).

At its core, petitioner's argument rests on formalism. He contends that the factual and legal issues that a federal court would have to determine as a predicate to an award of damages, and the consequences that would surely follow from those determinations, are entirely irrelevant to whether he must exhaust state remedies. As petitioner would have it, the need for exhaustion turns exclusively on the relief he seeks. But this approach is utterly irrational and, not surprisingly, inconsistent with this Court's precedent.

A. A State Prisoner's Challenge to the Lawfulness of His Conviction and Confinement Requires Exhaustion of State Remedies.

42 U.S.C. § 1983 contains broad language that allows actions claiming a deprivation of federal rights under color of state law to be brought in federal court. But that language says nothing about when and under what circumstances a federal court should grant relief, except that it should be

provided in a "proper proceeding for redress." Under this language, plenary consideration of claims may be postponed or even declined in order to accommodate other federal policies. *Cf. Allen v. McCurry*, 449 U.S. 90, 103 (1980) (rejecting idea that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises."). In particular, the absence of a general exhaustion requirement under § 1983 (*Patsy v. Board of Regents*, 457 U.S. 496, 500-01 (1982)), on which petitioner anchors his argument, has never been viewed by this Court as foreclosing particular exhaustion requirements in defined circumstances where other federal policies make such a requirement appropriate. *See Tower v. Glover*, 467 U.S. 914, 923-24 (1984) ("We therefore have no occasion to decide if a Federal District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court attacks on the conviction itself."); *Juidice v. Vail*, 430 U.S. 327, 339 n.16 (1977).

One example of this general principle is *Preiser v. Rodriguez*, 411 U.S. 475 (1973), a decision whose soundness petitioner does not question. In *Preiser*, this Court held that an action formally brought under § 1983 was nonetheless subject to an exhaustion requirement. The Court observed that a state prisoner's challenge to the "fact or duration of his confinement" lies at the "core of habeas corpus." *Id.* at 489. Habeas corpus, the Court thus held, is the *exclusive* remedy "when a state prisoner is challenging the very fact or duration of his physical confinement, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment." *Id.* at 500. The Court recognized that "the literal terms of § 1983 might seem to cover such a challenge," but nevertheless concluded that through 28 U.S.C. § 2254, "Congress has passed a more specific act to cover the situation." *Id.* at 489.

A second critical example for purposes of the present case is *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981). There, this Court held that a federal court should not hear a damages action brought under § 1983 against state taxing officials, even though the Tax Anti-Injunction Act, 28 U.S.C. § 1344, only bars injunctions. The Court reasoned that the comity principles embodied in the Tax Anti-Injunction Act were enough to foreclose the § 1983 action, notwithstanding the absence of a direct statutory overlap. *Fair Assessment*, like *Preiser*, demonstrates that although a statute addresses a particular form of relief, the policy considerations underlying that statute can be strong enough to limit the availability of other forms of relief as well. That principle applies here.

1. *The Comity Considerations Underlying Section 2254 Require Exhaustion Whenever a State Prisoner Is Attacking the Legality of His Confinement.* As this Court explained long ago, the requirement that state prisoners exhaust all state remedies before resorting to federal habeas corpus is rooted in fundamental considerations of comity:

> We cannot suppose that Congress intended to compel * * * [the federal] courts * * * to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts * * *. The injunction to hear the case summarily, and thereupon "to dispose of the party as law and justice require" does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound

> to guard and protect rights secured by the Constitution.

Ex parte Royall, 117 U.S. 241, 251 (1886). *See also, e.g., Ex parte Hawk*, 321 U.S. 114, 119 (1944). After Congress codified the exhaustion requirement in 1948, *see* 28 U.S.C. § 2254(b), this Court has continued to emphasize that its source lies in considerations of comity, and has construed the habeas statute to preserve that interest. *See Rose v. Lundy*, 455 U.S. 509, 518 (1982); *see also, e.g., Brecht v. Abrahamson*, 113 S. Ct. 1710, 1720-21 (1993); *McCleskey v. Zant*, 499 U.S. 467, 491 (1991); *Teague v. Lane*, 489 U.S. 288, 308 (1989).

When state courts are afforded the first opportunity to review constitutional claims brought by their own prisoners, the interests of comity are served in several respects. State courts "become increasingly familiar with and hospitable toward federal constitutional issues. Equally as important, federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review." *Rose*, 455 U.S. at 519 (citations omitted). Exhaustion also allows the state courts' supervisory system to oversee the lower courts and impose uniformity on them. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 609 (1975). Thus, the principles of comity underlying the exhaustion rule require not only that states be allowed the first opportunity to release their own prisoners, but also the initial opportunity to *decide* the issues that might justify release.

The rule this Court announced in *Preiser v. Rodriguez*—that habeas corpus is the exclusive remedy when a state prisoner challenges the fact or duration of his confinement—is squarely grounded on the comity concerns animating the exhaustion requirement. This Court stressed that "the reason why only habeas corpus can be used to challenge a state prisoner's underlying conviction is the strong policy requiring

exhaustion of state remedies in that situation—to avoid the unnecessary friction between the federal and state court systems that would result if a lower federal court would upset a state court conviction without first giving the state court system an opportunity to correct its own constitutional errors." 411 U.S. at 490 (citing *Fay v. Noia*, 372 U.S. 391, 419-20 (1963)). *See also id.* at 491 ("The rule of exhaustion in federal habeas corpus is rooted in considerations of federal-state comity.") (citing *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

Directly rebutting petitioner's argument here, the Court in *Preiser* explained that principles of comity demand that a complaint's substance, not its form, controls whether exhaustion is required.

> It would wholly frustrate congressional intent to hold that the respondents in the present case could evade [the exhaustion] requirement by the simple expedient of putting a different label on their pleading. In short, Congress determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.

411 U.S. at 489-90.

Preiser's focus on the comity interests served by § 2254(b) demonstrates that the exhaustion requirement applies to all prisoner claims challenging the legality of confinement—and most certainly to petitioner's here. Petitioner cannot deny he is "challenging his conviction" (411 U.S. at 489) within the meaning of that phrase in *Preiser*. He contends, however, that by restricting the relief he requests to damages, he is not seeking a "determination that he is entitled to immediate release or a speedier release from confinement." Pet. Br. at 13, 17 (quoting *Preiser*, 411 U.S. at 500). But to

award damages, a federal court would have to first find that petitioner's conviction was wrongful and his confinement improper. That finding would necessarily constitute a "*determination* that he is *entitled* to immediate release * * * from confinement," 411 U.S. at 500 (emphasis added), even though he has, for whatever reason, declined to request it. "[I]n effect the district court must first enter a declaratory judgment" that Heck is entitled to release. *Fair Assessment*, 454 U.S. at 113. As a matter of rudimentary logic, if Heck were not entitled to release, he would have suffered no damages for wrongful confinement. A federal § 1983 court need not actually grant release in order to make a determination that a prisoner is so entitled. *See id.*

It is inescapable that a federal court's determination in a § 1983 action that a state prisoner is entitled to release, irrespective of whether it orders release, would undermine the comity interests § 2254(b) is intended to protect. The state court would be deprived of the opportunity to *decide* whether the prisoner's constitutional rights were violated. Concomitantly, the state courts would be prevented from developing a factual record—a role that Congress expressly reserved for them. 28 U.S.C. 2254(d); *see also Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1719 (1992); *Rose*, 455 U.S. at 519. The federal court's determination would also frustrate Congress's interest in increasing state courts' familiarity with and hospitality toward federal constitutional issues. *See Rose*, 455 U.S. at 519.

Aside from these structural concerns, as a purely practical matter, a federal court's determination that a state prisoner's confinement is wrongful would go a long way, if not the entire way, toward securing that prisoner's release. In a subsequent state post-conviction proceeding, a state court in most instances would be exceedingly reluctant to disregard the federal court's determination. The state prisoner would thus begin the state proceeding with a strong presumption of success in his favor, and the federal judgment would exert an

intrusive and uninvited presence over the subsequent proceeding. *See Fair Assessment*, 454 U.S. at 113. On the other hand, if the state court chose not to follow the federal court, inconsistent judgments would exist on an issue so fundamental as whether an individual is wrongly imprisoned. Either result is destructive to the interests of comity that underlie the exhaustion requirement, and indeed form the very foundation of our federal system. Nor should it be forgotten that the precedential value of a § 1983 judgment would be uniquely persuasive in a subsequent federal habeas action. After all, in many instances, the very same federal court that entered the § 1983 judgment would review the habeas petition.

The effects of an initial federal court adjudication of the legality of confinement, moreover, may go beyond the persuasive, precedential and practical. As a legal matter, a state prisoner could in certain circumstances be entitled to use the § 1983 court's damages determination to bind the state in a subsequent action seeking release. On this point, petitioner's analysis of the preclusive effect of a § 1983 judgment is simply incomplete and his conclusion inaccurate.

Petitioner is correct that, as a general matter, a judgment against a state official in his personal capacity will not bind the government in future litigation, because the government was not formally a party to the litigation. But a nonparty, including the government, may be bound by a judgment if it exercises adequate control over the litigation. "'[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record.'" *Montana v. United States*, 440 U.S. 147, 154 (1979) (ellipses and brackets in original) (quoting *Souffront v. Compagnie des Sucreries de Porto Rico*, 217 U.S. 475, 486-87 (1910)). *See also Restatement (Second) of Judgments* § 39 (1982). Notably, the very

treatise on which petitioner relies recognizes not only *Montana's* control principle, but its potential applicability here. "This principle should apply to control of actions brought to assert personal liability against federal officials unless perhaps the circumstances demonstrate that a defense was provided as a personal benefit to the official rather than as a means of protecting the interests of the United States." 18 C. Wright, A. Miller & C. Cooper, *Federal Practice & Procedure* § 4458 at 349 (1993 Supp.).

In a state prisoner's action seeking damages against state officials, the state may have good reason to control the defense. For example, the state may be obligated to indemnify the officials for any judgment against them; the state may be required by statute to provide a defense; or the state may wish to protect against adverse legal precedent that would affect its policies or practices. In many circumstances, therefore, the state may be bound by a § 1983 judgment against state officials in their individual capacities. Adopting petitioner's approach, in short, could allow state prisoners to side-step, even as a legal matter, § 2254(b)'s exhaustion requirement and defeat the comity and federalism interests it serves. *See Deakins v. Monaghan*, 484 U.S. 193, 208 (1988) (White, J., joined by O'Connor, J., concurring) ("A judgment in a federal damages action may decide several questions at issue in a state criminal proceeding."); *Steffel v. Thompson*, 415 U.S. 452, 477 (1974) (White, J., concurring).

We recognize that not all (or possibly even most) prisoner § 1983 claims attacking the legality of a conviction would have preclusive effect on the state.[5] But that fact does not call for the creation of some sort of two-track system for resolving these claims, in which an exhaustion requirement

[5] We do not, of course, concede that the State of Indiana would be bound by a judgment against respondents in this action. Nor do we concede that the presence of any one or more the factors noted above would cause a state to be bound by a judgment.

would apply only to those claims that would have such an effect. Such a system would be utterly infeasible. At the time of filing, a federal court could not distinguish between claims that would bind the state and those that would not. Only after the § 1983 litigation has concluded, and a court could evaluate the degree of the state's control and the reasons for its participation, could any res judicata effects of a judgment be determined. Those inquiries are principally questions of fact. 18 *Federal Practice and Procedure*, *supra* § 4451 at 429. And there would be a whole host of issues to be resolved about the legal consequences of a claim being placed on a particular track. One can imagine an entire new, yet unproductive, jurisprudence being developed to cope with such as system.[6]

Nor it is an answer to suggest that a state may avoid the res judicata effect of a prisoner § 1983 suit merely by refusing to participate in the litigation. That approach would handicap the state when it has legitimate interests to protect in particular litigation. At the same time, that approach could cause tremendous hardship to the individual officers, who often must rely on the state for assistance in litigation of this sort. These results would be precisely the opposite of the comity and federalism policies that govern this area.

All of this points to the need for a bright-line rule. Some actions attacking the legality of a conviction could be used to obtain release from confinement—a result flatly prohibited by the square holding of *Preiser*. Yet the claims that fall in this category cannot be readily identified. Accordingly, all such claims should be subject to § 2254's exhaustion requirement.

[6] We are not aware of any decision in which a prisoner's successful § 1983 damages judgment was accorded preclusive effect in a subsequent suit seeking release. But no doubt that is because the federal courts have uniformly rejected petitioner's theory and have invariably required exhaustion of state remedies for claims such as his. *See infra* at 28 n. 12.

2. The Comity Interests Underlying Section 2254 Are Particularly Strong Where, as Here, A Prisoner Is Attacking a Valid State Court Judgment of Conviction. This Court's rule in *Preiser* requiring exhaustion of all claims challenging the legality of confinement is entirely sufficient to resolve this case. But petitioner's claim—which is an attack not only on his confinement, but also on a valid Indiana conviction—raises comity concerns above and beyond those present in *Preiser*. Thus, when a state judgment of conviction is attacked, exhaustion is even more strongly warranted than for attacks on prison officials' custodial decisions addressed in *Preiser*. For that reason, this case can be decided on a ground narrower than *Preiser*.

Preiser was concerned that a § 1983 action would interfere with future state proceedings. This case involves not just that concern, but also the prospect of interference with an extant state conviction. In its habeas jurisprudence, based on principles of comity, finality and federalism, this Court has always expressed extreme reluctance to disturb state judgments of conviction. *See, e.g., Coleman v. Thompson*, 111 S. Ct. 2546, 2562-65 (1991); *Butler v. McKellar*, 494 U.S. 407, 412-14 (1990); *Wainwright v. Sykes*, 433 U.S. 72, 88 (1977). As this Court has admonished, "[f]ederal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). In sum, the state criminal trial should be the "'main event'. . . rather than a 'tryout on the road'" to the federal habeas court. *Sykes*, 433 U.S. at 90.[7]

At least two other lines of authority reinforce this respect for state court judgments and, beyond that, reflect a

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[7] Thus, *Preiser's* comment that principles of comity have "as much *relevance*" to attacks on state administrative decisions in the prison context as to attacks on convictions, 411 U.S. at 492 (emphasis added), cannot be understood to mean that those principles apply with the *same force* in both contexts.

general principle that a federal § 1983 action cannot be used to review the propriety of state judgments. In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), this Court held that Congress did not intend for state court judgments generally to be subject to collateral attack under § 1983 in a federal district court.

Second, in *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny, this Court has instructed the lower federal courts not to disturb ongoing state proceedings, particularly criminal ones. *See, e.g., Juidice v. Vail*, 430 U.S. 327, 334 (1977); *Samuels v. Mackell*, 401 U.S. 66, 73 (1971). Based on "the notion of 'comity,' that is, a proper respect for state functions," this Court has emphasized that lower courts are to protect federal rights, but should "always endeavor[] to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger*, 401 U.S. at 44. As explained in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975),

> [i]nterference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from performing the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies. Such interference also results in duplicative legal proceedings, and can readily be interpreted "as reflecting negatively upon the state courts' ability to enforce constitutional principles."

Id. at 604 (quoting *Steffel v. Thompson*, 415 U.S. 452, 462 (1974)). Consistent with these concerns, the Court has broadly defined the concept of an ongoing state proceeding. A § 1983 plaintiff challenging the results of a state proceeding is required to "exhaust his state appellate remedies before seeking relief in the District Court," and—what is critical here—a party cannot avoid the requirement by simply electing

not to pursue those remedies, as petitioner seems to believe. *Id.* at 608, *cf.* Pet. Br. at 7 (noting the fact that certain of his claims were not raised on his criminal appeal). Just as in *Huffman*, this Court should not countenance petitioner's attempt to file this action and short-circuit the State's criminal process.[8]

As discussed previously, to award damages, a federal court would have to determine that petitioner's conviction was improper and his confinement wrongful. But here, a valid state court judgment stands that reflects just the opposite. Conflicting judgments of this sort could not help but create "unnecessary friction between the federal and state court systems." *Preiser*, 411 U.S. at 490. At the very least, a federal court's damages award predicated on a finding of wrongful confinement "could readily be interpreted 'as reflecting negatively upon the state court's ability to enforce constitutional principles.'" *Huffman*, 420 U.S. at 604 (quoting *Steffel*, 415 U.S. at 462). More generally, the existence of inconsistent judgments on an issue so fundamental as whether an individual is wrongfully imprisoned would erode confidence in the judicial system. Indeed, the approach advocated by petitioner could actually

[8] The reasons this Court has held that abstention is inappropriate when state proceedings have yet to begin have no application here. "[W]hile a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting the law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel*, 415 U.S. at 462. Petitioner obviously had the opportunity to litigate his constitutional claims in the state criminal proceeding that had already been commenced. Moreover, he did not initiate a § 1983 action to avoid the dilemma of either violating the law or foregoing activity he believes is constitutionally protected.

produce three inconsistent judgments: one from the state court, another from the § 1983 court and yet another from a federal habeas court. Indeed, petitioner posits this very hypothetical and apparently sees nothing wrong with it. Pet. Br. at 28-29 & n. 15. No rational legal system, however, can tolerate such a result.

Thus, a federal court should not review the propriety of a state proceeding so long as a state prisoner has elected not to pursue state remedies. *See Huffman*, 420 U.S. at 608. This is the only approach that is consistent with Congress's determination that habeas corpus is the exclusive method for challenging a state court conviction. *See Rooker*, 262 U.S. at 116. Finally, it bears emphasis that state prisoners would readily employ § 1983 to circumvent the procedural requirements of habeas corpus if only given the opportunity. *Cf. Gomez v. United States District Court of the Northern District of California*, 112 S. Ct. 1652 (1992).

B. Limiting the Requested Relief to Damages Provides No Ground for Avoiding Exhaustion.

Notwithstanding the foregoing reasons for exhaustion, petitioner argues that because he has, for the moment, limited the relief he seeks to damages, he may immediately pursue his § 1983 action in federal court. Aside from the fact that such as suit is pressed against the state officials in their individual capacities—a fact that is no more relevant here than in *Fair Assessment*—petitioner relies entirely on the fact his pleading seeks only damages to escape the exhaustion requirement. But reason and precedent demonstrate that the request for relief, standing alone, cannot possibly dictate the need for exhaustion.[9]

[9] Petitioner's reliance on the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997e, is misplaced. According to petitioner, because CRIPA provides a limited exhaustion requirement for certain prisoner § 1983 claims, Congress must have intended that a no-

1. A Request for Damages Based on an Allegedly Illegal Confinement Implicates the Same Comity Concerns As a Request for Habeas Corpus Itself. In *Fair Assessment*, this Court made it unmistakably plain that the request for relief in a § 1983 action does not control the availability of a federal forum. Thus, the Court stressed that the "focus was not on the specific form of relief requested, but on the fact that 'in every practical sense [it] operate[d] to suspend collection of the state taxes until the litigation [was] ended.'" 454 U.S. at 111 (brackets in original) (quoting *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943)). On this point, indeed, the majority and concurring opinions were in full agreement. *See id.* at 134-35 (Brennan, J. concurring).

Preiser also rested on this principle. This Court explained that "[i]t would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade [the exhaustion] requirement by the simple expedient of putting a different label on their pleading." 411 U.S. at 489-91. Thus, *Fair Assessment* and *Preiser* both demonstrate what is hardly a remarkable proposition: the practical and legal consequences of an action

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exhaustion rule apply to all other § 1983 claims. Pet. Br. at 12. But this logic leaves no room for the rule announced in *Preiser*, and petitioner does not go so far to suggest that Congress intended to overrule *Preiser*. On the contrary, CRIPA's legislative history contains no mention whatsoever of *Preiser*, thus indicating that Congress did not attempt to change that doctrine. Rather, the legislative history demonstrates Congress believed that adding an exhaustion requirement would reduce the number of state prisoner § 1983 claims. *See Patsy*, 457 U.S. at 508-09. Congress certainly did not believe, as petitioner suggests, that it was eliminating an exhaustion requirement for claims that lie at the core of habeas corpus, and thereby increasing the number of state prisoner § 1983 claims. Notably, Congress has consistently declined to enact legislation containing a no-exhaustion rule for all § 1983 claims. *See id.* at 563 (Powell, J., dissenting) (citing S. 1983, 96th Cong., 1st Sess., § 5 (1979)).

govern the availability of federal relief, not something so formalistic and easily subject to manipulation as the relief requested. *See also Samuels*, 401 U.S. at 73. This principle is only reasonable, for prisoners would have every incentive to engage in such manipulation if allowed to do so. *Cf. Gomez*, 112 S. Ct. at 1652.

As is evident from the discussion above, the fact that petitioner has sought only damages does nothing to alter that he is demanding a "determination that he is entitled to immediate release." *Preiser*, 411 U.S. at 500. Nor does this pleading device avoid the comity concerns animating § 2254(b). Those policies would be seriously compromised if a federal court were to consider his claim on the merits, much less actually grant relief. The state courts would be of deprived of the first opportunity to decide petitioner's constitutional claims; would be prevented from developing the factual record; and would become no more familiar with or hospitable toward federal constitutional claims. Moreover, as a practical matter, and possibly as a legal matter, a federal damages award would pave the way for a state prisoner to secure his release. And since petitioner is directly challenging the lawfulness of his conviction, a federal damages judgment would immediately result in inconsistent judgments on the issue of whether he is properly confined. Contrary to petitioner's assertion, these concerns are neither "intangible" nor "inarticulable." Pet. Br. at 25.

Petitioner is therefore wrong that exhaustion of state remedies is not warranted merely because those remedies cannot provide him with the precise relief he seeks. The nature of his underlying claim makes it impossible to blind oneself to the real stakes. Petitioner contends that he is entitled to damages because he should not be confined, yet insists that he does not want in *this* proceeding to be released. The courts surely must assume, however, that a favorable judgment in this case would inexorably lead to another proceeding in which petitioner does seek his release. It is

wholly unrealistic to view the limited request for relief as anything but a temporary form of self-restraint, designed only to avoid the exhaustion requirement, but not meaningfully to alter what will ultimately be the result.

When a state prisoner attacks the legality of his conviction, as petitioner has done here, there are reasons above an insistence on substance over form why the courts should refuse to honor the prisoner's expressed desire *not* to be released. After all, if a prisoner is actually entitled to damages because he was wrongfully confined, the State itself probably has little motivation to continue to incarcerate that prisoner. Putting to one side the State's moral obligation to release an innocent person, which is certainly powerful, the State obviously would have an economic interest in not consuming its scarce prison resources on an individual who, by hypothesis, should not be confined. Thus, from the State's point of view, as from the prisoner's, it is the substance of the claim, not the relief sought, that matters.

Indeed, petitioner's claimed interest in immediate access to a federal forum for a damages action would, if accepted, create a perverse ranking of relevant interests. Both Congress, in enacting § 2254(b)'s exhaustion requirement, and this Court, in its *Younger* doctrine, have concluded that a state prisoner's interest in avoiding or ending an unconstitutional deprivation of his very freedom is subordinate to considerations of comity that require exhaustion. If such a direct interest in personal liberty is insufficient to overcome the principles of comity underlying the exhaustion requirement, the prisoner's interest in immediate damages deserves even less weight. For several reasons, petitioner's argument turns the obvious hierarchy of constitutional values upside down.

First, prolonged confinement, if improper, causes irreparable harm of the most serious nature. A delay in obtaining damages, by contrast, is in and of itself never

irreparable. A prisoner can always recover additional payments that would fully compensate for any losses caused by a delay in obtaining adjudication of his claim.

Second, not only is there a complete absence of an immediate need for petitioner to obtain the relief he seeks, there is also no particularly compelling need for initial adjudication by a federal court of the underlying claims. The general no-exhaustion rule, this Court has explained, derives principally from the 1871 Reconstruction Congress's view that "the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights." *Patsy*, 456 U.S. at 505. These concerns, however, lose their force when a prisoner is using § 1983 to attack the legality of his conviction. Through the habeas statutes, Congress has long since concluded that state courts not only are adequate, but are the superior forum for initially reviewing claims of that sort. *See, e.g., Brecht v. Abrahamson*, 113 S. Ct. 1710, 1720-21 (1993); *Rose*, 455 U.S. at 518.

Petitioner nevertheless argues that the form rather than substance of a complaint should govern the exhaustion requirement because lower courts are capable of little more than understanding a complaint's form and cannot be expected to recognize when a claim challenges the legality of a conviction. Pet. Br. at 30-31 (citing *Guerro v. Mulhearn*, 498 F.2d 1249, 1254 (1st Cir. 1974)). History soundly defeats this argument, for in the two decades since *Preiser*, the lower courts have experienced no difficulty whatsoever recognizing such challenges. *See infra* at 28, n.12. *See also* M. Schwartz, *The* Preiser *Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DePaul L. Rev. 85, 134-36 (1988) (collecting cases). The concern expressed by the First

Circuit in *Guerro* some twenty years ago has simply never materialized.[10]

2. Neither Wolff v. McDonnell *Nor* Preiser's *Dictum on the Availability of Damages Control Petitioner's Claim.* Petitioner is also wrong when he suggests that *Wolff v. McDonnell*, 418 U.S. 539 (1974) "already has resolved this issue in petitioner's favor." Pet. Br. at 20. First, whatever else may be said of *Wolff*, that decision did not involve an attack on the legality of a valid state court conviction. Quite the opposite, the Court explained that "damages claims * * * could be pressed under § 1983 along with suits challenging the *conditions* of confinement *rather than the fact or duration of custody*." 418 U.S. at 554 (emphasis added). Accordingly, the distinctive comity concerns relating to federal court deference to state *courts* discussed above played no part in *Wolff*.

Second, even on its own terms, *Wolff* is distinguishable. Nothing in *Wolff* suggests that the prisoners were seeking damages to compensate them for the actual loss of good-time credits. The prisoners' damages claim appears to have been intended to compensate them for being subjected to unconstitutional procedures relating to the withdrawal of good-time credits, irrespective of the results of those procedures. As the Court noted, the prisoners were seeking damages "resulting from the *use* of the allegedly unconstitutional procedures." *Id.* at 553 (emphasis added). Petitioner is therefore incorrect that "[t]o prevail in their damages action, the prisoners would have to demonstrate that

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[10] We believe that where a judgment in a § 1983 action would resolve a necessary element to a likely challenge to a conviction, even if the § 1983 court does not determine that the conviction is invalid, the comity interests embodied in § 2254(b) would counsel in favor of exhaustion. In any event, the Court need not resolve that peripheral issue here, because under any standard petitioner is attacking the legality of his conviction.

the withdrawal of their good time was unconstitutional." Pet. Br. at 22. The withdrawal of good time may well have been constitutional, but the procedures employed to effectuate the withdrawal may not have been. *Cf. Haring v. Prosise*, 462 U.S. 306 (1983) (state prisoner who plead guilty may seek damages for illegal search and seizure).[11]

The same is true of the terse footnote in *Gerstein v. Pugh*, 420 U.S. 103, 107 n.6 (1975) from which petitioner draws "strong support." Pet. Br. at 23 n. 11. There, the pre-trial detainees did not complain that they were arrested without probable cause and thus, had they been afforded a hearing, they would have been released from confinement. Rather, the detainees merely sought a hearing, irrespective of its results. 420 U.S. at 106-07.

Nor should this Court's dictum in *Preiser* regarding the availability of a damages claim be given the weight petitioner places on it. Acknowledging that it was unnecessary to its decision, the Court briefly commented that

> [i]f a state prisoner is seeking damages, he is attacking something other than the fact or length of confinement, and he is seeking something other than immediate or more speedy release—the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is *not* an appropriate or available federal remedy. Accordingly, * * * a damages action by a state prisoner could be brought under the Civil Rights

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[11] Furthermore, it is unclear whether damages could have been recovered by the prisoners in *Wolff*, given this Court's decision not to apply its holding retroactively. 418 U.S. at 573-74. This Court would not likely have contemplated that the prisoners could recover damages for conduct that, at the time it occurred, was not illegal. *Cf. Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, *Wolff*'s comments regarding the cognizability of a damages action may be fairly characterized as dictum.

> Act in federal court without any requirement of prior exhaustion of state remedies.

411 U.S. at 494 (emphasis in original). By its own terms, this dictum is limited to situations where, *unlike* here, a state prisoner is "attacking something other than the fact * * * of confinement." While claims seeking damages may *generally* fall in this category, *cf. Haring, supra*, petitioner's here do not. In short, the Court could not have been contemplating claims such as petitioner's. Not surprisingly, over the past two decades since *Preiser*, the lower federal courts have uniformly rejected petitioner's reading of this dictum and his argument generally.[12]

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE APPROPRIATE REMEDY IS DISMISSAL WITHOUT PREJUDICE.

This Court has held time and again that a habeas corpus petition containing claims for which state remedies have not been exhausted should be dismissed. Indeed, the Court has expressly rejected the notion that such a claim should be held

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[12] *See, e.g., Tedford v. Hepting*, 990 F.2d 745, 748-49 (3d Cir.), *cert. denied*, 114 S. Ct. 317 (1993); *Scruggs v. Moellering*, 870 F.2d 376, 378-79 (7th Cir.), *cert. denied*, 493 U.S. 954 (1989); *Williams v. Hepting*, 844 F.2d 138, 143-44 (3d Cir.), *cert. denied*, 488 U.S. 851 (1988); *Spina v. Aaron*, 821 F.2d 1126, 1127-28 (5th Cir. 1987); *Feeney v. Auger*, 808 F.2d 1279, 1281 (8th Cir. 1986); *Leonard v. Hammond*, 804 F.2d 838, 840 (4th Cir. 1986); *Monk v. Secretary of Navy*, 793 F.2d 364, 366-68 (D.C. Cir. 1986); *Hadley v. Werner*, 753 F.2d 514, 516 (6th Cir. 1985) (per curiam); *Caldwell v. Line*, 679 F.2d 494, 496 (5th Cir. 1982); *Richardson v. Fleming*, 651 F.2d 366, 372-73 (5th Cir. 1981); *Franklin v. Webb*, 653 F.2d 362, 363-64 (8th Cir. 1981); *Hamlin v. Warren*, 664 F.2d 29, 30-32 (4th Cir. 1981), *cert. denied*, 455 U.S. 911 (1982); *Parkhurst v. State of Wyoming*, 641 F.2d 775, 777 (10th Cir. 1981) (per curiam); *Meadows v. Evans*, 550 F.2d 345, 349 (5th Cir.) (en banc) (*aff'd per curiam*, 529 F.2d 385 (5th Cir. 1976)), *cert. denied*, 434 U.S. 969 (1977); *Fulford v. Klein*, 529 F.2d 377, 381 (5th Cir. 1976); *Guerro v. Mulhearn*, 498 F.2d 1249, 1252-53 (1st Cir. 1974); *accord Martin v. Merola*, 532 F.2d 191, 194 (2d Cir. 1976).

on the district court's docket pending exhaustion of state remedies. Moreover, intensely practical considerations support precisely such a rule in cases such as petitioner's.

Nor do concerns petitioner raises about the appropriate application of the statute of limitations counsel a different rule here. First, state limitations law and coordinate tolling rules provide adequate protection against unfairly "barring the courthouse door" to meritorious claims. Second, even if state law did not, the court of appeals was entirely correct that federal law would provide ample protection. Speculative concerns about the results of a limitations inquiry that, in all likelihood, will never take place, are an extremely poor foundation on which to base a rule dealing with claims such as petitioner's.

A. This Court Has Consistently Held that Unexhausted Habeas Claims Should be Dismissed, Not Stayed.

When a habeas corpus petition contains unexhausted claims, this Court has consistently held that the proper remedy is dismissal, not a stay. The Court expressly considered and rejected the stay alternative in *Slayton v. Smith*, 404 U.S. 53 (1971). There, the Fourth Circuit had instructed the district court to stay the proceedings while the petitioner sought relief in the state courts. This court rejected such a procedure in plain and unequivocal terms and held that "absent special circumstances, rather than ordering retention of the case on the District Court's docket, the Court of Appeals should simply have vacated the judgment of the lower court and directed dismissal of the petition for failure to exhaust state remedies." 404 U.S. at 54 (citations omitted).

Since *Slayton*, this Court has repeatedly directed dismissal where the petitioner had not complied with the exhaustion requirement. Thus, the Court held in *Duckworth v. Serrano*, 454 U.S. 1 (1981), that "the Court of Appeals was obligated *to dismiss* respondent's petition." 454 U.S. at

4 (emphasis added). Similarly in *Rose v. Lundy*, 455 U.S. 509 (1982), a case dealing with "mixed" petitions that included both exhausted and unexhausted claims, the Court could not have been more clear about the required remedy: "we hold that a district court *must dismiss* habeas petitions containing both unexhausted and exhausted claims." 455 U.S. at 522. And outside the habeas context, this Court has found dismissal warranted for § 1983 actions that would impermissibly intrude on state proceedings. *See Fair Assessment*, 454 U.S. at 117; *cf. Huffman*, 420 U.S. at 611 (district court "should not have entertained" action absent applicability of an exception to *Younger*).

The same result should apply here. For the reasons set forth in part I, *supra*, a suit challenging the lawfulness of conviction and confinement fully implicates the comity principles underlying the exhaustion requirement of § 2254, and its ultimate and practical effect would be to achieve an end-run around § 2254. Accordingly, such an action should be treated just as would a § 2254 petition, and if it contains unexhausted claims, it should be dismissed. As this Court noted in *Preiser*, "[i]t would wholly frustrate explicit congressional intent [behind the exhaustion requirement] to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings." 411 U.S. at 489-90. In such a circumstance, "exhaustion of adequate state remedies [is] a condition precedent to the invocation of federal judicial relief. . . ." *Id.* at 490. Accordingly, the appropriate remedy is dismissal, not a stay.[13]

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[13] Nor is *Deakins v. Monoghan*, 484 U.S. 193 (1988), to the contrary. Unlike here, *Deakins* did not involve claims that lay at core of habeas corpus. The plaintiffs in *Deakins* had not been convicted by a state court and were apparently not even in custody. *See* 484 U.S. at 196-99. Indeed, *Deakins* did not even mention *Preiser*, and the concern that congressionally imposed limitations on habeas corpus not be circumvented. Even on its own terms, *Deakins* recognized that dismissal might be appropriate "where the order to the parties to repair to the State court would clearly serve an important countervailing interest." 484 U.S. at 203 (multiple citations and internal quotation marks omitted). It is difficult to imagine a more "important countervailing interest" than federal noninterference with the state criminal process mandated by § 2254(b).

B. Practical Considerations Counsel Against the Rule Suggested by Petitioner

Apart from the fact that dismissal is plainly the remedy specified by prior case law, that remedy is also supported by sound practical considerations. Petitioner's premise that the rule adopted by the court of appeals will result in the dismissal of meritorious § 1983 claims is fundamentally flawed. The vast majority of claims such as those alleged in petitioner's action will ultimately require dismissal in any event, for a variety of reasons. Moreover, both state law concerning limitations generally, and federal law concerning statutes of limitations applicable to § 1983 actions are more than adequate to preserve those few that may be ultimately found to have merit. Petitioner's request that this Court adopt a rule that would require the retention of thousands of frivolous actions on the dockets of the federal district courts in order to protect a mere handful of meritorious ones that are adequately protected anyway is therefore unwarranted.

1. The Vast Majority of Claims Such As Petitioner's Will Ultimately Be Found Without Merit. To decide whether the rule petitioner urges should be adopted, the Court should first consider how likely it is that the reason he advances for it—the danger of barring *meritorious* suits—will actually occur. Any such consideration must begin with the recognition that the vast majority of attacks on the legality of state convictions are found so meritless that a hearing is not even required. For example, of the 10,087 habeas corpus petitions that were filed in the year ending June 30, 1989,

1,403 were disposed of with no court action at all, and another 8,457 were disposed of before any sort of pretrial hearing was held. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 208 (1989). Another 89 were disposed of during or after a pretrial hearing. *Id.* Thus, only 138, or 1.4% reached trial. *Id.* Fewer still, it must be assumed, actually resulted in any relief.[14] Because the legality of petitioner's conviction is already firmly established against him, and because the illegality of his conviction is an essential element of his § 1983 action, unless he can make out a claim sufficient for *habeas corpus* relief, the conviction itself will stand as an insuperable bar to any relief under § 1983. *Allen v. McCurry, supra.*[15]

While this alone counsels against holding actions such as petitioner's on the district court dockets for years, there are additional obstacles that would bar a § 1983 action even if habeas relief is successfully obtained. For example, petitioner cannot sue either the State itself, or State officials in their official capacities both because they are not "persons" within the meaning of § 1983 and because the 11th Amendment would bar any such suit. *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989).

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[14] For prisoner § 1983 actions, figures are similar, though a slightly larger proportion of the 24,231 such cases, 4.2%, actually reached trial. *Id.* These actions, of course, also include suits challenging conditions of confinement, which are somewhat more likely to result in relief.

[15] Respondents recognize that, ultimately, this inquiry turns on relevant state-law preclusion principles. However, petitioner himself recognizes that "most" states would apply an estoppel in such circumstances and that "virtually all" prisoners are potentially subject to such a rule. Pet Br. at 29, n. 15. In fact, it is difficult to imagine that *any* State would hold a prisoner was validly convicted, yet award him damages for his confinement.

Moreover, even in their individual capacities, some defendants, such as defendants Humphrey and Ewbank, will in all likelihood enjoy absolute immunity for most, if not all of petitioner's claims. *Imbler v. Pactman*, 424 U.S. 409 (1976). Indeed, given the vagueness of petitioner's other allegations, he may be seeking to hold even the non-prosecutor defendants liable for acts within the scope of absolute immunity. *Cf. Briscoe v. LaHue*, 460 U.S. 325 (1983) (witness absolutely immune for testimony given in a judicial proceeding).[16]

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[16] While petitioner's complaint is artfully drawn to allege that "Both the defendants Humphrey and Ewbank, even though County Prosecutors at said time, were acting as 'police investigators', and not functioning in their quasi-judicial capacities against the plaintiff," Pet App 23a, it is far from clear these conclusory allegations can withstand scrutiny. For example, to the extent petitioner was harmed by the supposedly suggestive voice identification procedure, the harm he complains of (his conviction, though allegedly innocent), plainly flowed from the victim's *in-court* identification testimony, and it is clear that the prosecutors enjoyed absolute immunity in presenting that testimony. *Imbler*, 424 U.S. at 431 (absolute immunity applies to prosecutor's conduct "in presenting the State's case"). Indeed, absolute immunity most likely applies even to the prior out of court identifications. *Id.* at 430 (out of court "effort to control the presentation of witness' testimony" entitled to absolute immunity); *see also Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2615 (1993) (rejecting argument that absolute immunity applies only to "the act of initiation itself and to conduct occurring in the courtroom" as an "extreme position . . . plainly foreclosed by our opinion in *Imbler* itself."). Moreover, petitioner's allegations that defendants "took items from [the decedent's] relatives and used them in their unlawful, unreasonable, and arbitrary investigation of [petitioner]" may be nothing more than an allegation that the items referred to were introduced in evidence against petitioner, again an act to which absolute immunity attaches. *Briscoe, supra.* This seems particularly likely given that petitioner has expressly limited his allegations to the time period "between May and July 1987," a period long after the "investigation" was complete.

Indeed, it is difficult to imagine how allegations like petitioner's, which directly attack the legality of his conviction, could fall outside the scope of absolute immunity, yet still state a claim for relief under § 1983. *See Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2620 (1993) (Scalia, J., concurring) ("If 'reframe[d] . . . to attack the preparation' of that evidence, the claims are unlikely to be cognizable under § 1983, since petitioner cites, and I am aware of, no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution."). *Cf. Albright v. Oliver*, 114 S. Ct. 807 (1994) (claim that a party was prosecuted without probable cause did not state a claim for deprivation of liberty without due process).[17]

Moreover, even for acts not falling within the scope of absolute immunity, yet still violating the criminal defendant's constitutional rights (if any such acts are possible in this case), qualified immunity may well be available unless the defendants violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *E.g. Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Buckley*, 113 S. Ct. at 2613.[18] This standard is particularly

[17] Some of the opinions in *Albright* noted that the petitioner might have stated a claim for an unlawful arrest under the Fourth Amendment, but the Court declined to decide the issue because it was not urged in either the petition for writ of certiorari or the petitioner's briefs. *See* 114 S. Ct. at 812 & n. 5 (plurality opinion of Rehnquist, C.J.); *id.* at 814-15 (separate opinion of Ginsburg, J.); *id.* at 821 (separate opinion of Souter, J.). Petitioner here, however, has alleged no unlawful arrest, nor has he alleged an unlawful search. *See supra* at 4.

[18] While petitioner has, again, attempted to craft his complaint to anticipate a qualified immunity defense, Complaint ¶ 5, it is far from clear the allegations will withstand scrutiny. For example, petitioner has identified no case establishing that the voice identification procedure

unlikely to be met if the conduct alleged by the prisoner has been considered on direct review of his State conviction and found to be lawful, (as petitioner's claim of improperly suggestive voice identification was).[19] State courts, no less than federal courts, are bound to faithfully interpret and apply federal constitutional principles in reviewing judgments of conviction. Indeed, state courts have *primary* responsibility for doing so in the context of the criminal law.

In sum, the likelihood of a claim such as petitioner's purported § 1983 claim actually forming the basis of § 1983 relief is extremely small. It simply makes no sense for this Court to adopt a general rule requiring the district courts to hold thousands of dormant cases on their dockets in order to protect the tiny number of cases that ultimately might lead to relief. This is particularly true because existing case law already provides adequate protection for those few claims that have merit, as shown below.

2. *Existing Case Law Adequately Protects Those Few Claims That Are Meritorious.* A second reason petitioner's proposed rule should be rejected is that there is no danger that those few claims which ultimately prove meritorious will be unfairly barred by the statute of limitations—the sole reason petitioner, and the authorities cited by him, give for the adoption of the rule he advocates. State tolling rules plainly provide relief from the statute of limitations to the diligent plaintiff forced to delay bringing his claim while he exhausts state remedies. And even if they did not, federal law would do so.

used in his case was illegal at all, much less a case "clearly establishing" that it was illegal.

[19] Indeed, the claim was also rejected by both the district court, J.A. 55-56, and the Seventh Circuit on habeas review found the error, if any, "harmless beyond a reasonable doubt." J.A. 62. This Court denied certiorari. *Heck v. Richards*, 113 S. Ct. 1308 (1993)

Indiana law provides that where a plaintiff must complete one judicial proceeding before he can commence another, the statute of limitations on the latter does not begin to run until the former is complete. *State ex rel. Pink v. Cockley*, 110 Ind. App. 417, 37 N.E.2d 284, 288 (1941) ("We think that the rule in this state is well settled that where a litigant is prevented from enforcing his remedy during the pendency of legal proceedings, the time during which he is thus prevented will not be counted against him in determining whether a statute of limitations has barred his action."); *see also City of Fort Wayne v. Hamilton*, 132 Ind. 487, 32 N.E. 324, 327 (1892); *Commercial Credit Corp. v. Ensley*, 148 Ind. App. 151, 264 N.E.2d 80, 86 (1970). Indeed, this rule is apparently followed in substantially all American jurisdictions. *See* 54 C.J.S. *Limitation of Actions*, §§ 121-22; 93-94 (1987); 51 AM. JUR. 2D *Limitation of Actions* § 170.

That, of course, is precisely the same situation that confronts a plaintiff with a claim such as petitioner's when he must first exhaust his state remedies before proceeding in federal court.[20]

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[20] This is not to suggest that petitioner's claim *in this case* is automatically saved from the statute of limitations. For Indiana law, while excusing the time necessarily consumed in satisfying conditions precedent to suit, still requires plaintiffs to proceed with dispatch. In other words "A person who has it in his power to make his cause of action complete must do so within a reasonable time, and the statute of limitations will not await the pleasure or convenience of the plaintiff." *Scates v. State*, 178 Ind. App. 624, 383 N.E.2d 491, 493 (1978); *see also Krafft v. Thomas*, 123 Ind. 513, 24 N.E. 346, 346-47 (1890) (where demand is a prerequisite to suit, demand must be made within a reasonable time because "[i]f the rule was otherwise, a party, by his own act or failure to act, could preclude the running of the statute of limitations until such time as might suit his interest, convenience, or pleasure to put it in motion.") Here, even after the district court told petitioner he must exhaust his state remedies on February 1, 1989 (well within the statute of limitations if, as petitioner alleges, the alleged misconduct took place "between May and July, 1987" Pet. App. 23a), he

However, even if Indiana law would not provide the diligent plaintiff with relief from the statute of limitations, it is clear that federal law would provide a remedy where necessary. While petitioner recognizes that state statutes of limitations and tolling rules may not be applied to § 1983 claims "when their use 'would defeat the goals of the federal statute,'" Pet. Br. at 38-39 n. 23 (quoting *Hardin v. Straub*, 490 U.S. 536, 539 (1989)), he fails to recognize the significance of that admonition for cases where exhaustion is required as a matter of federal law. There is little, if any, doubt that neither this Court nor any other would countenance a time-bar of a *truly* meritorious § 1983 suit where it could not previously have been brought because the plaintiff was first required to exhaust state remedies. Indeed, as one of the cases relied upon by petitioner bluntly states, "it would hardly promote the goals of the Civil Right Act of 1871 to twice deny prisoners a federal forum for § 1983 complaints, once for being too early and again for being too late." *Young v. Kenny*, 907 F.2d 874, 878 (9th Cir. 1990).

Such a situation would not, as petitioner suggests, be a case where a state statute "merely . . . causes the plaintiff to lose the litigation," Pet. Br. at 39 n. 23 (quoting *Board of Regents v. Tomanio*, 446 U.S. 478, 488 (1980)), but one where the plaintiff would be deprived of *any* opportunity to even have the claim *considered*, no matter how diligent he was. As shown above, state law does not lead to such a result. But if it did, the federal courts have full power to provide relief.[21]

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still has refused to present his claims to the state courts. *See* Pet. Br. at 7 & n.2 (conceding that he still has not exhausted any of his claims other than that pertaining to the allegedly illegal voice identification procedure, which both the district court and the Seventh Circuit rejected on habeas corpus review).

[21] Given the small likelihood that a federal court would actually be called upon to fashion an equitable tolling doctrine to govern such

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

PAMELA CARTER
Attorney General of Indiana

MATTHEW R. GUTWEIN*
AREND J. ABEL
DANA CHILDRESS-JONES
Deputy Attorneys General

Counsel for Respondents
(*Counsel of Record)

April 1994

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claims, respondents agree with petitioner that the court of appeals' detailed discussion of the probable contours of any such doctrine was unnecessary, and express no opinion on whether those contours were accurately described.

Appendix

Motion To Correct Errors
[filed October 16, 1987] ..... App. 2

Order Denying Motion To Correct Errors
[November 25, 1987] ..... App. 3

Petition For Dissolution Of Marriage
[Filed October 22, 1985] ..... App. 4

Motion For Provisional Orders
[Filed October 22, 1985] ..... App. 6

Provisional Orders
[October 22, 1985] ..... App. 7

Excerpts of Testimony From Petitioner's Criminal Trial ... App. 8

State of Indiana) In The Dearborn Circuit Court
) SS:
County of Dearborn) General Term, 1987

State Of Indiana)
)
vs.)
) Cause No. 9764
Roy Heck, Sr.)

MOTION TO CORRECT ERRORS
[filed October 16, 1987]

The defendant, Roy Heck, Sr., requests the Court to correct error for the following reasons:

* * *

2. The judgment of conviction is contrary to the evidence in the following respects:

* * *

kk. the Court erred and was abusive of its discretion by permitting the State of Indiana to present evidence during its case in chief by the direct examination of Police Officers Lyman Connoly and Michael Kreinhop concerning the search and discovery of the body of Rickie Heck for the reason that the same was a result of a search conducted by an illegal search warrant;

* * *

WHEREFORE, defendant prays that the court alter the judgment herein and enter a Verdict of Not Guilty, order a new trial, or any other proper relief.

VOTOW & DORNETTE

John J. Dornette /s/

John J. Dornette
Attorney for Defendant
Roy E. Heck, Sr.

R. I at 1 - 10

State of Indiana) In The Dearborn Circuit Court
) SS:
County of Dearborn) General Term, 1987

State Of Indiana)
)
vs.)
) Cause No. 9764
Roy Heck, Sr.)

ORDER DENYING MOTION
[November 25, 1987]

Comes now the defendant, Roy Heck, Sr., by Counsel, Joseph W. Votaw and J. Jeffrey Dornette, and having heretofore filed his Motion To Correct Errors, which Motion is in the words and figures as follows, to wit: (H.I.)

And the Court having examined said Motion and being duly and sufficiently advised in the premises, now finds that defendant's Motion to Correct Errors should be denied.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED BY THE COURT: That defendant's Motion To Correct Errors be and the same hereby is denied.

Dated this 25th day of November, 1987.

Anthony C. Meyer /s/

Anthony C. Meyer, Judge
Seventh Judicial Circuit

cc: Prosecutor
Votaw

R. III at 511

State of Indiana) In The Dearborn Circuit Court
) SS:
County of Dearborn) General Term, 1985

In re: The Marriage of Rickie)
) Cause No. 25021
Lynn Heck and Roy E. Heck)

PETITION FOR DISSOLUTION OF MARRIAGE
[Filed October 22, 1985]

Comes now the petitioner, Rickie Lynn Heck, and being first duly sworn upon her oath, and for petition for dissolution of marriage, says:

1. That she has been a resident of the State of Indiana for more than six (6) months last past and a resident of the County of Dearborn for more than three (3) months immediately preceding the filing of this petition;

2. That the parties were married on the 4th day of April, 1964 and lived together as husband and wife but have since separated on or about the 30th day of August, 1985;

3. That three (3) children were born as a result of this marriage, namely: Roy Heck, Jr., age 20, Roberta L. Heck, age 18, who are both now emancipated, and Joseph E. Heck, age 15; and that this petitioner, is the fit and proper person to have the care, custody and control of said minor child subject to reasonable visitation by respondent;

4. That petitioner is not now pregnant;

5. That an irretrievable breakdown has occurred in the marriage;

6. That certain property has been accumulated during the course of the marriage which should be adjusted by the Court.

WHEREFORE, petitioner prays that the marriage referred to herein be dissolved; that the petitioner be awarded the care, custody and control of the minor child of the parties, subject to reasonable

visitation by the respondent; that the Court make a determination concerning the support of the minor child herein; that the Court make an equitable division of the properties accumulated during the course of the marriage; for her attorney fees; and all other just and proper relief in the premises.

Rickie Lynn Heck /s/
Rickie Lynn Heck

[JURAT OMITTED]

R. VIII at 2035-1 - 2035-2 (States Ex. 101)

State of Indiana)
) SS:
County of Dearborn)

In The Dearborn Circuit Court

General Term, 1985

In re: The Marriage of Rickie)
)
Lynn Heck and Roy E. Heck)

Cause No. 25021

MOTION FOR PROVISIONAL ORDERS
[Filed October 22, 1985]

Comes now the petitioner, Rickie Lynn Heck, and being first duly sworn upon her oath, deposes and says:

* * *

7. That your petitioner has reason to believe that said respondent is possessed of a violent and dangerous temperament and that he should be restrained from harassing or bothering the petitioner at any time or any place during the pendency of this proceeding;

* * *

WHEREFORE, your petitioner prays from an immediate restraining order . . . restraining the respondent from harassing or bothering the petitioner at any time or any place. . . and all other relief proper in the premises.

Rickie Lynn Heck /s/

Rickie Lynn Heck

[JURAT OMITTED]

R. VIII at 2035-3 - 2035-4 (States Ex. 101)

State of Indiana)
) SS:
County of Dearborn)

In The Dearborn Circuit Court

General Term, 1985

In re: The Marriage of Rickie)
)
Lynn Heck and Roy E. Heck)

Cause No. 25021

PROVISIONAL ORDERS
[October 22, 1985]

Comes now the petitioner, Rickie Lynn Heck, and having heretofore filed her duly verified motion for provisional orders, which motion is in the words and figures following, to-wit:

(H.I.)

And the Court having examined said motion and being duly advised in the premises now finds that the prayer thereof should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that . . .Roy E. Heck be and he hereby is restrained from harassing or molesting Rickie Lynn Heck at any time or any place.

All of which is ordered this 22 day of October, 1985.

Anthony C. Meyer /s/

Anthony C. Meyer, Judge
Dearborn Circuit Court

R. VIII at 2035-5 - 2035-6 (States Ex. 101)

Excerpts of Testimony From Petitioner's Criminal Trial

THOMAS G. BAUER, BEING FIRST DULY SWORN AND UPON HIS OATH, TESTIFIES AS FOLLOWS, WITH DIRECT EXAMINATION BY ROBERT J. EWBANK, SPECIAL PROSECUTING ATTORNEY.

Q. Officer, state your name for the record, please.

A. Thomas G. Bauer.

• • •

Q. And, what is your occupation?

A. Lieutenant with the Dearborn County Police Department.

• • •

Q. Okay. Officer, I'll call your attention to the 3rd day of November, 1985, at that time did you receive a report of battery from Rickie Heck?

A. I did.

• • •

Q. Okay. At the time Rickie Heck . . . did Rickie Heck come to the police department?

A. Yes.

Q. Okay. At the time Rickie Heck came to the police department, did you notice any bruising or other things about her presence?

A. Yes, she had marks.

Q. Okay. Would you describe those marks to the jury?

A. She had marks on her throat.

Q. Okay. Any other marks?

A. Not that I remember.

• • •

Q. Officer, did she make any requests of you at that time?

A. Yes, she requested police protection.

• • •

Q. Now, Officer, after she requested police protection, did she explain to you why she wanted police protection?

A. Yes, she did.

Q. What did she tell you?

A. She said her husband was going to kill her.

Q. Officer, did she indicate any fear about even making the report to you?

A. Yes.

Q. What did she tell you?

A. She was afraid that there would be retaliation, because of the report.

Q. Officer, as to these bruises that you noticed on her neck, did she indicate who had done that to her?

A. Yes, she did.

Q. And, who was that?

A. Her husband.

Q. And, is that Roy Heck, Sr.?

A. Yes.

R. VI, 1286-91.

MARILYN CHRISMAN, BEING FIRST DULY SWORN AND UPON HER OATH, TESTIFIES AS FOLLOWS, WITH DIRECT EXAMINATION ON REBUTTAL BY JAMES D. HUMPHREY, PROSECUTING ATTORNEY.

• • •

Q Ms Chrisman, I'm going to direct your attention to on or about September, 1984. Did you have occasion, in that time period, to see Rickie Heck and Roberta Heck?

A Yes.

Q And, what were the circumstances of this meeting?

A Well, they both came to my home late one evening, ah, and Rick's face was all swollen and she had knots on the back of her head, . . .

• • •

Q After you observed these injuries, did you discuss them with Rickie?

A Yes, I did.

Q And, what did she tell you about them.

[Objection made and overruled]

Q You may answer.

A The had been someplace, I'm not sure where, she said there was road blocks. . . I guess she meant like, barricades or something in the road, ah, I don't remember everything, but there was a girlfriend involved there someplace, of Roy's, and Bobbi and Rick and Roy were in the red truck or in the truck, I assumed it was the red one, ah, and, I don't [know] how, an argument started, but one was. . . Roy became angry and he had taken his hand, like this (indicating), while he was driving, and he started hitting her head against the back window of the truck, and was squeezing her face, and her face became all bruised, and that's how she got the places on the back of her head. So, Bobbi finally got Rick out of the truck, ah, and she was driving a little red car at that time, and

she brought Rick out home and we had to put cold cloths on her face . . .

R. VIII, 1940-47.

ROY HECK JUNIOR, BEING FIRST DULY SWORN AND UPON HIS OATH, TESTIFIES AS FOLLOWS, WITH DIRECT EXAMINATION BY JAMES D. HUMPHREY, PROSECUTING ATTORNEY.

• • •

Q. Mr. Heck, are you the son of the defendant?

A. Yes, I am.

Q. And, were you also the son of Rickie Heck?

A. Yes, I am.

• • •

Q. Mr. Heck, would you describe to the jury what life was like between your mother and your father while they were together?

A. It was good, in the earlier stages, but as things progressed, it got worse. It got violent.

Q. And, when did this begin?

A. When I was about fifteen, about seven years ago.

Q. Mr. Heck, did you ever observe any physical violence between your mother and father?

A. Yes, Sir.

Q. Would you tell the jury about it?

A. A couple of years ago, I was standing in the kitchen looking out the window and my mother and father was having a fight and mom said she wanted to go to her mom's, to grandma Burton's and when she tried to get in the car, dad slammed the car door on her several times.

Q. Now, Mr. Heck, are you aware of any other. . . did you ever observe any other violence between your mother and father?

A. I can't remember the exact date, but one time around the end of 1985, he come to our. . . mine and my wife's trailer while my mother was staying there and kind of threw mom around quite a bit.

• • •

Q. Now, that incident, were your mother and father living together at that time?

A. No, Sir.

Q. Did there come a time when they separated?

A. Yes, Sir, about August of '85.

Q. Now, the incident that you just mentioned taking place at the trailer park, that was after the separation, is that correct?

A. Yes, Sir.

Q. And, would you tell the jury what you saw happen that night?

A. Me and my wife was asleep in the front bedroom, my mother was sleeping in the back bedroom and I guess it was about two o'clock in the morning or so, my wife woke me up and said she heard shattering glass. So, I got up and walked to the front door and there was a hand reaching inside unlocking the front door. The time I got there, my father was stepping in. I don't remember exactly all that happened from then on, cause it went so fast, but mom had heard him come in. He was yelling at me. I stepped back. She run in. I stepped back into the bedroom to tell my wife what was going on, I believe, and she followed me back in. They was having words.

Q. Now, by they, who do you mean?

A. My parents. Mom and dad.

Q. Was your mother living with you at that time?

A. Yes.

Q. What happened next?

A. I. . . we both stepped back out and my wife went to the bathroom, she was scared. I went in and couldn't find nothing. Dad was really wild acting, so, I looked for something to use to get him out. All I could find was a little broom. I stepped back in and seen him throwing her against the couch, just kind of harassing her, more or less. I stepped back out. The whole time, she was yelling for him to leave and when I come back, he had left.

• • •

Q When was the last time you saw your mother?

A Saturday afternoon, I guess it would have been January 5th, been Saturday.

Q Would this be the Saturday before your mother disappeared?

A Yes, Sir.

Q So, would that have been Saturday, January 4th?

A Fourth, yes, yes.

• • •

Q Mr. Heck, I'm going to direct your attention to Sunday, January 5, 1986, the next day. What do you recall happening on that day?

A Well, toward the evening, I received a phone call from my father, I'd say about nine to nine thirty and he said that my mother was going to be taking a trip and that she wanted me to take care of her car while she was gone and just to inform me that she would be leaving.

• • •

Q What else did your father tell you at this time?

A He told me that he would pick me up at five o'clock the following morning to get her car. He said he'd pick me up and he'd just take me up there and I could drive it to work.

Q And, where did he say you were going to?

A My mother's trailer.

• • •

Q What happened after that?

A Well, I received a call about five o'clock the next morning stating that he was on his way, he'd pick me up. . .

Q Was this call from you father also?

A Yes. And, dad picked me up about five-thirty Monday morning and we drove to Lawrenceburg and got the car.

• • •

Q On the way to your mother's trailer, was there any conversation between you and your father?

A Just small, nothing major. He was extremely high strung, but I just kept talking with him, you know, I thought he . . . maybe had had been out drinking.

Q What happened after that?

A We got to mom's trailer court and the keys was . . . he said that mom said that she would leave the keys laying outside the door underneath the step and they were there.

Q Is that what your father said?

A Yes.

Q For clarification, this is Monday morning?

A Yes, yes.

Q What happened then?

A We. . . he picked up the keys and . . .

Q Did he, excuse me, did he seem to have any trouble finding where the keys were?

A No, Sir. No, he just went straight to them.

Q Where were they located?

A Up against the trailer and there were some stone steps that come to it, they were in the corner, wedged down in there.

Q What happened then?

A We went in the trailer. We just stepped in to look at things. I turned the light off that was over the sink. One thing that kind of caught my eye while I was in there, when I was walking toward the light was, there was a skillet containing sliced up potatoes, fried potatoes, that hadn't been touched, they'd been cooked, they was partially cooked sitting in grease and there was a full pot of coffee on the stove, both of them cold, turned off, but they had been untouched.

• • •

Q: Prior to leaving the trailer, did you notice anything else out of place unusual?

A: The trailer was in a general mess. There was a plant turned over and there was like a . . . mom had a plastic clothes rack she dried clothes inside the trailer on, it was all turned over and chairs turned over. It was a mess.

Q: Is that unusual?

A: For my mother, yes. She was extremely clean.

Q: Prior to your . . . you and your father leaving that morning, did you have any further conversation?

A: Just about the meeting at seven o'clock that evening.

Q: You arranged to meet there that night?

A: Yes.

Q: Did he tell you anything else?

A: Just to pick up mom's check at Marathon Restaurant.

Q: Well, what happened later that evening?

A: I come down to meet him at seven and he wasn't there yet, so, I drove up to Marathon and they would not give me her check.

• • •

Q: Well, what happened after that?

A: I drove back to the trailer and he arrived shortly thereafter.

Q: And, did you meet with your father at that location?

A: Yes, We went in the trailer. He was concerned about thefts while mom was gone, is what he told me. He said we aught to remove all the valuable items. So, he took the T.V. and some food out of the refrigerator and a carton of cigarettes. I believe that was all.

• • •

Q: At this time, did you (STRIKE THAT). Did you observe anything else, at this time, that you didn't observe the first time you were there?

A: Yes, come to think of it, I believe it was that time that I went in and I found that the drawers and that was open on her closets. It was that evening.

• • •

Q: Directing your attention to Tuesday, this being January 5th, did anything unusual happen on that day?

A: I received a phone call from my Aunt Marilyn directly after work, I believe it was, . . .

• • •

Q: What did Marilyn tell you at this time?

A: She ask me to go to the trailer and look around a little better to see if I'd overlooked anything cause we didn't know what had happened. . .

[Objection made and overruled]

Q: After being requested to do this, what did you do?

A: Well, after I got done talking to Marilyn, I went to my father's farm and ask him for the keys to the trailer.

• • •

Q: And, when you arrived at the farm, was your father there?

A: Yes, he was. He. . .

Q: And, did you notice anything unusual about his appearance or the was he was acting at that time?

A: When we pulled up, we pulled up to the farm and parked right in front of the barn and I got out of the truck and just as soon as I stepped out, here come dad running toward me. I told my wife, I said, stay in the truck, somethings odd and I met him and I told him what I wanted was the keys. He turned around and ran into the house and got them and met me in the yard with them. Which was unusual for him to run.

Q: Did you ever get inside the house at that time?

A: No, Sir.

• • •

Q Did it appear to you, based upon your observations, that you were going to be permitted to go in the house?

A No, Sir. No, Sir.

Q Did you get the keys to the trailer?

A Yes, Sir.

Q And, what did you do after receiving the keys?

A Me and my wife, Chris, drove down to the trailer and we looked around the best we could. Didn't really find nothing out of the ordinary at that time.

Q Did you see anything different then you had seen before? If you recall.

A Yes, yes, Sir. My flashlight was on the bed, where it hadn't been the day before.

Q Where had this flashlight been?

A Right around Christmas time, my mother had some trouble with her car and me and my father worked on it and he ended up with my flashlight that night.

• • •

Q What happened after that?

A I took my wife home and went to return the key to the farm.

Q And, when you got back to [the] farm, what did you do?

A Well, I got there and dad wasn't home at the time, so, I went on in and put the key on top of the T.V. for him and when I was leaving I noticed one of mom's suitcases laying on the stairway to the upstairs of the farm.

• • •

Q Mr. Heck, did it appear to you [at the scene of your mother's trailer] that there had been some type of struggle?

[Objection made and overruled]

A Yes, Sir.

R III, 681-701

ROBERTA HECK, BEING FIRST DULY SWORN AND UPON HER OATH, TESTIFIES AS FOLLOWS, WITH DIRECT EXAMINATION BY JAMES D. HUMPHREY, PROSECUTING ATTORNEY.

• • •

Q And, Ms. Heck, are you the daughter of Rickie Heck?

A Yes, I am.

Q And, Roy Heck?

A Yes, I am.

• • •

Q Directing your attention to approximately late summer, early fall 1985, were your mother and father living together at that time?

A In 1985?

Q Yes.

A They were up until September.

Q And, then what happened?

A Okay. My mother moved out from my father, she left him Memorial Day, or Labor Day, whichever day falls in September.

• • •

Q Ms. Heck, did you ever observe any physical violence between your mother and father?

A Before? When we all lived on the farm?

Q Yes.

A Yes, I did, a lot.

Q Would you tell the jury about that.

A Well, on one event, we were all down here at the . . . they had like a jamboree down here between the Jesse Hunt House and, I don't know what's on the other corner. It's just right down . . . back there and on the way home, well, my mother had accused my father of seeing a girl that was there and

along the way home, he got violent with her and grabbed her head, right here, and started smashing her head against the back of the truck and I was sitting on the other side of her and I was trying to cushion the blows and it didn't work and when we. . . well, on the way home, he was driving fast anyway, and there's these little, they're like horses, you know, the little wooden horses that have the lights on them, we went smashing through those. I'd say about ten or twelve of them and when we got home, he called the police up and told them that, well, the Sheriff's Department, told them that he had hit them, that some kid had stuck them in the road or something and like, he was trying to get them to pay for it. Pay for his truck. The damage that it was caused and, so, he had went down to meet them and at that time I was persuading my mother to leave with me and we left that night. Took a lot to talk her into it, but we left that night, because she was bruised, she was. . . and we went and. . . she didn't want to go to my aunts or anything, because she didn't want them to know she was having marital problems or something, but I eventually talked her into staying at my Aunt Marilyn's that night.

Q: Prior to their separation, did you observe any other physical violence?

A: Yes.

Q: What was that?

A: This was just a lot of it. Just. . .

Q: Did you ever observe any injuries your mother received as a result of this?

A: Before she left my father?

Q: Yes.

A: Yes, there was bruises and he liked to grab, there's a muscle here (INDICATING) and he always liked to grab between the muscle and the bone right here and squeeze and bruised, left bruises and he liked to grab at the knee and squeeze and leave bruises. That's where she was bruised that one night also, right on the knee.

* * *

Q: Bobbi, at any time. . . directing your attention to Wednesday of that week [the week of the disappearance], did you receive any phone calls, that you recall?

A: Yes, I did. I was at work at Dillsboro Manor and our work hours were six to two-thirty and I received a call around, it was around lunch time and my father asked me to meet him after work. Okay, he gets off at three-thirty. He wanted me to meet him at the 4th Street Pub and during the conversation he ask me if I knew anything about mom taking a trip to Florida. Okay, and I hadn't, because I had not been corresponding with mom and I told him that I hadn't and he just said that she had taken a trip. He said something, but anyway, he ask me to meet him at the Pub after work.

* * *

[Testimony indicating that petitioner had been arrested on a charge of failure to appear for the battery trial and that the witness went to visit him at the jail omitted]

Q: What did your father request?

A: Okay. He requested us to go up in the attic and get a . . . he had. . . okay, he said that there was going to be a search over home and he didn't want to be connected with any of mom's things and when he had went and got her car, because she had supposedly called him at three o'clock in the morning and asked him to get her car. He got. . . apparently got in her house and took a few things and he said that there was going to be a search and he didn't want to be connected with any of mom's things and he asked us to go up in the attic and he said, there's a little ledge there and he said, you reach over the ledge and you'll find one of mom's spare purses. He said he'd got it, because he thought there might be money in it. And, I knew my dad was good at selling stuff and hocking stuff and all that stuff.

* * *

Q: Your father make any other requests?

A: Yes. He ask us to get a suitcase, that was located at the bottom of the stairs and he said he just got that out of the trunk of mom's car.

Q: And, did he request anything else?

A: Okay. He ask us if. . . well, he ask me. . . he pointed at me, because of the sink hole, I'd lived on the farm for a long time, forever, it seems and he asked me if I knew where the sink hole was at. . . . And, he asked us if I knew where that place was, okay, but then when he asked us what we was going to do, he pointed at both Shirley and I. . . .

• • •

Q: What did he request?

A: Okay. He requested that we go get two things of pepper and sprinkle on that area, because he said there was going to be a search and he said that he had hidden mom's T.V., radio and jewelry box down there and just to sell, because he had the key to her trailer.

Q: Roberta, what did your father request that you do with this pepper?

A: Oh, sprinkle it on there, I'm sorry, just sprinkle it on the whole area.

• • •

Q: Did you[r] father ever tell you why, he wanted this pepper sprinkled?

A: He said that there was going to be a search and that he didn't want to be connected with any of mom's stuff. Well, he said there was going to be a search and. . . the only think I could think of, was that he didn't want to be connected with mom. . . you know, because they had asked questions about mom's disappearance and here he was with mom's stuff.

• • •

Q: What happened to the purse?

A: Okay. Right after my dad got out of jail on Friday, I think he got out on Friday, he called me up and said he'd be down to

get it. Okay. and that was about a fifteen minute drive and at the time I looked through it, when he was on his way to come down and get it.

Q: You looked through the purse?

A: I looked through. . . well, I got time to look through the top part of it.

Q: What did you see?

A: I found her wallet with her drivers license and her social security card and some make-up and stuff like that in it.

• • •

Q: Roberta, prior to the time that your father got out of jail, did he make any other requests of you?

A: To make a phone call.

Q: What type of phone call?

A: To the jail house and say that. . . he ask me first, to say that I was Rickie Heck, because he. . . because they told him if they heard from mom, he could get out.

R. 794-816

BILL KINNETT, BEING FIRST DULY SWORN AND UPON HIS OATH, TESTIFIES AS FOLLOWS, WITH DIRECT EXAMINATION BY JAMES D. HUMPHREY, PROSECUTING ATTORNEY.

• • •

Q: Mr. Kinnett, directing your attention to New Years Eve 1985, the early morning hours of New Years Day 1986. Did you have an occasion at that time to meet with Rickie Heck?

A: Yes, I did.

• • •

Q: What did she tell you at this time, Mr. Kinnett?

[Objection made and overruled]

A: Okay. She said that she needed to get access to a gun, because she was afraid that Roy was going to try to kill her.

MARILYN CHRISMAN, BEING FIRST DULY SWORN AND UPON HER OATH, TESTIFIES AS FOLLOWS, WITH DIRECT EXAMINATION BY JAMES D. HUMPHREY, PROSECUTING ATTORNEY.

• • •

Q: And, are you the sister of Rickie Heck?

A: Yes.

• • •

Q: Directing your attention to December of 1985, Marilyn, did you have occasion to have lunch with Rickie during that month?

A: Yes, we had lunch a few times. The one time was, ah, I think about the 19th of December, we were to meet as Frisch's for lunch.

Q: And, did you meet at Frisch's?

A: No, we didn't.

Q: Where did you meet?

A: At her trailer.

• • •

Q: Marilyn, did you end up going to the trailer?

A: Yes, I did.

Q: And, what happened when you arrived?

A: Well, ah, it took me about twenty minutes by the time I left work, picked up our dinner at Frisch's and then went to her trailer, ah, and when I knocked on the door, I heard some noise and she was moving about, like she was frightened. I don't know what was going on in there, and it took me a few minutes to convince her that it was me, and she finally opened the door and when she did, she had a pair of scissors in her hand like this (INDICATING) and when she saw it was me, she laid the scissors back down. I think it was like on a cedar chest there by her front door.

Q: And, what happened then?

A: Well, I went in and I put our lunch on her table, but she never did eat. She didn't touch a bit of her food, ah, and she proceeded to tell me what had happened and show me some bruises on her.

Q: Where did you see these bruises?

A: She took her slacks off. They were from like her knees, they just came right up and, although she didn't take her underclothes off, you could see where sort of up above her stomach, into her stomach, it was bruised.

Q: Did she tell you anything about these bruises?

A: Yes.

Q: What did she tell you?

[Objection made and overruled]

A: Okay. Ah, a few days earlier, she had been at the American State Bank and I . . . that Roy came in the bank and drug her out or they went out and he put her in the car, and she said he grabbed this arm around her head and kept banging her head against this door and this fist, he kept hitting her with this fist, and that's how the bruises, how she got the bruises.

Q: During the time on this same date, did you notice anything unusual about the trailer?

A: Well, it was really neat, except just like where she had met me at the door with the scissors, within arms reach of anyplace in the trailer, I didn't go back into the hall or the bathroom, but there was little table there by her couch, I think, and there was knife there, there was scissors laying by her bed, ah, there was knives or scissors within arms reach of anyplace in her trailer.

Q: Marilyn, on this same occasion, did Rickie ask you to do anything or make any requests of you?

A: Yes.

Q: What requests did she make?

[Objection made and overruled]

A: Okay. She said that Roy was going to kill her, ah, and she would come up missing and she made me promise her that I would investigate and I wouldn't stop until I. . . well, she said she didn't want the sonofabitch to get by with it, and I promised her.

Q: Marilyn, when was the last time you saw Rickie?

A: Ah, New Years Eve, December 31st.

Q: Did you have any information at that time or any time later that she was planning on leaving the area, taking a trip?

A: None.

• • •

R. 1186-99

TESSIE STANDRIFF, BEING FIRST DULY SWORN AND UPON HER OATH, TESTIFIES AS FOLLOWS, WITH DIRECT EXAMINATION BY JAMES D. HUMPHREY, PROSECUTING ATTORNEY.

• • •

Q: Now, Tessie, back in January of 1986. . .

A: Yes, Sir.

Q: Where were you living then?

A: I live in Valley Village Trailer Court, lot 14.

• • •

Q: Okay. And, could you see Rickie Heck's trailer from your trailer?

A: Yes, Sir.

• • •

Q: Okay. Now, let's go back in time to January 5, 1986, a Sunday.

A: Yes.

Q: Did you work on that day?

A: Yes, Sir.

• • •

Q: About what time did you get home from work?

A: Yes, I came from work, it's 11:30 in that night.

• • •

Q: Where did you look when you looked out the window?

A: In my trailer—UNINTELLIGIBLE—the Rickie Heck trailer, because just notice they have lights on outside and in.

• • •

Q: What happened then?

A: Then I went up and then, I just saw a man knock on the door, about just five or ten minutes I guess, but I'm not too sure what time it is.

• • •

Q: Okay. Then what happened?

A: Then what happens he was knocking the door so hard.

Q: He's knocking on the door hard you say?

A: And harder and harder, two times.

• • •

Q: Did you ever see Rickie Heck?

A: Yes.

Q: Did she answer the door when he was knocking

A: Not first I don't, but the second time she answered the door.

• • •

Q: Yes. Tell the jury what you heard.

A: Yes, he said, he, "It's a motherfucker, your coming home with me." He says, "Yes, your my wife."

• • •

Q: What did she say?

A: She said she's com. . .she's not going home, she's not going back home with him, because this my apartment.

• • •

Q: Did any. . . what happened after they said these things?

A: And, they say that thing and then they just go in that trailer and the front there and shut the door.

Q: Are you saying he went in the trailer?

A: Yes, Sir.

Q: Did she let him in or how did this happen?

A: Well, it happen, he don't let her in, she was stopping him, she don't want to become. . . get in that trailer, but he pushed into get in that trailer and then he shut the door.

Q: He pushed to get in the trailer and then shut the door?

A: Yes. Yes, Sir.

R. III, 579-880

LYMAN CONLEY, BEING FIRST DULY SWORN AND UPON HIS OATH, TESTIFIES AS FOLLOWS, WITH DIRECT EXAMINATION BY ROBERT J. EWBANK, SPECIAL PROSECUTING ATTORNEY.

Q: And, what is your occupation?

A: I'm an Indiana State Trooper.

• • •

Q: Okay. Now, I'd like to call your attention to October the 27th, 1986.

• • •

Q: What do you recall about that day?

A: I was assigned to assist Detective Kreinhop upon the serving of a search warrant on the Roy Heck farm, north of Lawrenceburg.

• • •

Q: And, who served the warrant?

A: Detective Kreinhop read the search warrant to Mr. Heck. I was present with him, we both went to the residence, we read it to him, gave him a copy of the search warrant and then we left his house and moved back to the location where we were going to excavate.

Q: Did the defendant, in any manner, respond to your enunciation of the search warrant.

[Objection made and overruled]

A: The search warrant was read to the defendant, there at his residence. Defendant then asked if. . . where we were going to dig at, ah, Detective Kreinhop responded with that we were going to dig out by the road. . . .

• • •

A: Detective Kreinhop and I got in my car and we drove back to the location where the. . . at the corner in the bend in the road there where that one area of trash and debris was located, we were going to start to dig at that point.

Q: Is that also known as the sink hole site?

A: Right, the sink hole.

• • •

Q: Did anything significant happen at the time on the 27th, when you initially started your search of the sink hole site?

A: Detective Kreinhop and I had just returned to the sink hole site, when there was a vehicle came out from the residence, it was very shortly afterwards, like four or five minutes after we'd left the residence at a high rate of speed, went by us, made the turn and left the area and we didn't see the vehicle again after that while we were on the property.

• • •

Q: Now Officer, at the time this bucket first dragged the torso from the gravesite, where you smelled the strong odor. . .

A: Yes, it was very foul.

Q: Did you observe anything unusual about the curling iron as far as its location.

A: One end of the cord, near the plug in, was hooked up. . . had been gathered up by the bucket at the same time that it hooked up with the material. The curling iron came down away from the hook on it and was down and around the edge of the sleeve that was there and was entangled in the coat itself where the neck area was at and then hung down on the ground.

• • •

Q: Okay. And was it wrapped. . . it was wrapped around the neck area?

A: Yes, it was.

R. V, 1238-R. VI, 1258.